

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JACK JORDAN,

Plaintiff,

v.

U.S. DEPARTMENT OF LABOR

Defendant.

NO. CV-07-5011-EFS

**ORDER GRANTING IN PART,  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS, GRANTING  
DEFENDANT'S MOTION TO STRIKE,  
STRIKING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT, AND  
DENYING PLAINTIFF'S REQUEST  
FOR ATTORNEY'S FEES AND MOTION  
TO AMEND COMPLAINT**

On September 14, 2007, the Court held a hearing in the above-captioned matter. Tom H. Foulds appeared on behalf of Plaintiff Jack Jordan. Rolf H. Tangvald appeared on behalf of Defendant U.S. Department of Labor. Before the Court was Defendant's Motion to Dismiss (Ct. Rec. 3) and Motion to Strike Plaintiff's Motion for Summary Judgment (Ct. Rec. 16). Also before the Court was Plaintiff's Motion for Summary Judgment (Ct. Rec. 6), Request for Attorney's Fees (Ct. Rec. 6), and Motion for Leave to File Amended Complaint (Ct Rec. 22). After reviewing the submitted material and hearing oral argument, the Court was fully informed. The Court grants in part and denies in part Defendant's motion to dismiss and grants Defendant's motion to strike. The Court strikes Plaintiff's Motion for Summary Judgment. The Court also denies

1 Plaintiff's request for attorney's fees and Plaintiff's motion for leave  
2 to file amended complaint. The reasons for the Court's order are set  
3 forth below.

## 4 I. Background

### 5 1. EEOICPA Statutory Background

6 In 2000, Congress passed the Energy Employees Occupational Illness  
7 Compensation Program Act of 2000 ("EEOICPA"), 42 U.S.C. § 7384, *et seq.*  
8 The EEOICPA provides benefits to individuals with illnesses caused by  
9 exposure to radiation and other toxic substances in the course of their  
10 work related to the nuclear weapon production and testing programs of the  
11 United States Department of Energy ("DOE") or its predecessor agencies.  
12 42 U.S.C. § 7384. EEOICPA Part B allows covered employees or their  
13 eligible survivors to receive a \$150,000 lump-sum payment and medical  
14 benefits for certain illnesses from radiation, beryllium, or silica  
15 exposure while working at DOE facilities. 20 C.F.R. § 30.0. EEOICPA  
16 Part E allows covered employees or their eligible survivors to receive  
17 lump-sum payments and medical benefits based on a worker's permanent  
18 impairment and/or calendar years of qualifying wage-loss. *Id.*

19 The Department of Labor ("DOL") is primarily responsible for  
20 administering EEOICPA Part B and E claims. Any person seeking benefits  
21 must file a claim with the DOL's Office of Workers' Compensation Programs  
22 ("OWCP"). 20 C.F.R. §§ 30.100 & 30.101. If a person claims to be a  
23 deceased employee's survivor, sufficient evidence of the claimed  
24 relationship must be furnished. EEOICPA regulations define "child" as  
25 a "recognized natural child, a stepchild who lived with an individual in  
26

1 a regular parent-child relationship, and an adopted child. . . ." 42  
2 U.S.C. § 7384s(e) (3) (B) .

3 After reviewing a claim, the OWCP issues a recommended decision.  
4 20 C.F.R. § 305. The claimant then has 60 days to file objections with  
5 the Final Adjudication Branch ("FAB"). 20 C.F.R. § 310. The FAB will  
6 consider a claimant's objections and hold a hearing, if requested, before  
7 issuing the final agency decision. 20 C.F.R. §§ 30.314 & 30.316. An OWCP  
8 recommended decision automatically becomes the final agency decision one  
9 year after the agency receives the claimant's objections. 20 C.F.R. §  
10 30.316(c). This provision safeguards against unnecessary agency delay.

11 **2. Plaintiff's EEOICPA Part B and E Claims**

12 On October 15, 2002, Plaintiff filed an EEOICPA Part B claim seeking  
13 benefits for his late uncle's death from lung cancer. Plaintiff's uncle  
14 was a former worker at the Hanford Nuclear Site and qualified for  
15 EEOICPA benefits. Plaintiff claimed he was an eligible surviving child  
16 because he had a parent-child relationship with his uncle.

17 On December 17, 2002, the Division of Energy Employees Occupational  
18 Illness Compensation ("DEEOIC") recommended denying Plaintiff's Part B  
19 claim for failure to establish that he is an eligible surviving child.  
20 A month later, the FAB vacated the recommended decision, remanding the  
21 claim for further development.

22 On April 12, 2003, Plaintiff sent additional information to the DOL,  
23 including why he considered his uncle a father. On September 23, 2003,  
24 the Chief of the Branch of Policies, Regulations and Procedures (a  
25 division of the DOL) concluded Plaintiff, in the absence of additional  
26 information, does not qualify as an eligible surviving child. On October

1 3 and 21, 2003, the DEEOIC sought additional information about  
2 Plaintiff's relationship with his uncle. Plaintiff did not respond.

3 On June 9, 2005, Plaintiff's representative informed the DEEOIC that  
4 his client wished to file a Part E claim. The DEEOIC received  
5 Plaintiff's Part E claim the following week. On October 27, 2005, the  
6 DEEOIC requested additional documentation to show proof of adoption.

7 The following week on November 3, 2005, Plaintiff's representative  
8 sent a letter to the DEEOIC arguing that Plaintiff qualifies as an  
9 eligible surviving child based upon a Washington Supreme Court case  
10 released that day discussing *de facto* parentage. On November 16, 2005,  
11 the DEEOIC recommended denying Plaintiff's Part B and Part E claims.  
12 This recommendation did not fully address Plaintiff's legal arguments.

13 On January 12, 2006, Plaintiff objected to the recommendation and  
14 requested an oral hearing, which took place on March 30, 2006. At the  
15 hearing, Plaintiff's representative raised the *de facto* parent legal  
16 argument.

17 On July 15, 2006, the FAB forwarded Plaintiff's claim to the  
18 DEEOIC's Branch of Policies, Regulations and Procedures ("BPRP")  
19 requesting guidance on Plaintiff's legal arguments. On December 12,  
20 2006, the BPRP requested a legal opinion from the Office of the Solicitor  
21 of Labor ("SOL"). On February 26, 2007, the SOL issued a legal  
22 memorandum briefing Plaintiff's arguments. The following week, the BPRP  
23 sent the legal memo to the FAB, satisfying the FAB's earlier request for  
24 legal guidance.

25 Meanwhile, the DEEOIC's recommended decision automatically became  
26 the final agency decision on January 17, 2007. Plaintiff sought judicial

1 review with this Court on March 9, 2007. And on April 30, 2007, the  
2 Director vacated the DOL's final agency decision, remanding the case to  
3 fully consider Plaintiff's legal arguments.

## 4 II. DISCUSSION

### 5 A. Motion to Dismiss

6 Defendant argues the Court lacks subject matter jurisdiction  
7 because: (1) there is no "final agency action" on Plaintiff's EEOICPA  
8 Part B claim under 5 U.S.C. § 704 of the Administrative Procedure Act  
9 (APA); and (2) there is no "final decision of the Secretary" on  
10 Plaintiff's EEOICPA Part E claim under 42 U.S.C. § 7385s-6(a). (Ct. Rec.  
11 4 at 5.) Defendant alternatively asks to hold this matter in abeyance  
12 pending the new final decision on Plaintiff's entitlement to EEOICPA  
13 benefits. (Ct. Rec. 4 at 5.) Plaintiff responds that Defendant cannot  
14 properly take away the Court's subject matter jurisdiction by vacating  
15 the final decision and remanding Plaintiff's case for further development  
16 and issuance of a new decision. (Ct. Rec. 6 at 2.)

17 To obtain judicial review under the APA, plaintiff must challenge  
18 a final agency action. 5 U.S.C. § 704;<sup>1</sup> *Lujan v. Nat'l Wildlife Fed'n*,  
19 497 U.S. 871, 882 (1990). In *Bennett v. Spear*, the Supreme Court held  
20 that agency action is considered "final" when two sets of conditions are  
21 satisfied. 520 U.S. 154, 177-78. "First, the action must mark the  
22 'consummation' of the agency's decision making process - it must not be  
23 of a merely tentative or interlocutory nature." *Id.* (citations omitted).

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24  
25 <sup>1</sup> "Agency action made reviewable by statute and final agency action  
26 for which there is no other adequate remedy in a court are subject to  
judicial review." 5 U.S.C. § 704.

1 Secondly, "the action must be one by which 'rights or obligations have  
2 been determined,' or from which 'legal consequences will flow.'" *Id.* at  
3 178 (citations omitted). As the Supreme Court has stated, "the core  
4 question is whether the agency has completed its decision making process,  
5 and whether the result of that process is one that will directly affect  
6 the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). And  
7 because 42 U.S.C. § 7385s-6(a)<sup>2</sup> contains similar language requiring  
8 "final decision of the Secretary" before a court may review a claim,  
9 similar finality requirements are necessary.

10 Here, Defendant correctly argues there is no final agency action on  
11 Plaintiff's EEOICPA Part B and E claims. It is true that on January 17,  
12 2007, the OWCP recommended decision became a final agency decision under  
13 30 C.F.R. § 30.316(c)<sup>3</sup> due to a year of case inactivity. Accordingly,  
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15 <sup>2</sup> "Judicial review. A person adversely affected or aggrieved by a  
16 final decision of the Secretary under this subtitle [42 U.S.C. § 7385s  
17 *et seq.*] may review that order in the United States district court in the  
18 district in which. . . the survivor lives. . . ." 42 U.S.C. § 7385s-  
19 6(a).

20 <sup>3</sup> "Any recommended decision (or part thereof) that is pending after  
21 either a hearing or a review of the written record for more than one year  
22 from the date the FAB received the written statement described in §  
23 30.310(a), or the date the Director reopened the claim for issuance of  
24 a new final decision pursuant to § 30.320(a), shall be considered a final  
25 decision of the FAB on the one-year anniversary of such date. Any  
26 recommended decision described in § 30.311 that is pending at the FAB

1 Plaintiff's March 9, 2007, appeal to this Court for judicial review was  
2 appropriate.

3 But on April 30, 2007, the Director vacated the FAB's final  
4 decision, finding it did not adequately address Plaintiff's legal  
5 arguments. Under 20 C.F.R. § 30.320(a)<sup>4</sup>, the Director is entitled to  
6 take such action and any decision is "solely within the discretion of the  
7 Director for Energy Employees Occupational Illness Compensation and is  
8 not reviewable." 20 C.F.R. § 30.320(c).

9 Unreasonable delay in Plaintiff's EEOICPA claim determination is a  
10 factor for the Court to consider. But Plaintiff's counsel did not raise  
11 the argument that Plaintiff qualifies as a *de facto* child until November  
12 3, 2005, less than two weeks before the OWCP issued its November 16  
13 recommendation denying Plaintiff's claim. This short notice formed the  
14 basis for the Director's determination that Plaintiff's claims were not  
15 sufficiently adjudicated. Because there is no final agency decision and  
16 the DOL should be allowed to fully investigate Plaintiff's claims to  
17 determine their merit, immediate judicial review is not appropriate.

18  
19 \_\_\_\_\_  
20 for more than one year from the date that the period of time described  
21 in § 30.310 expired shall be considered a final agency decision of the  
22 FAB on the one-year anniversary of such date." 20 C.F.R. § 30.316(c).

23 <sup>4</sup> At any time after the FAB issued a final decision pursuant to §  
24 30.316, and without regard to whether new evidence or information  
25 is presented or obtained, the Director for Energy Employees  
26 Occupational Illness Compensation may reopen a claim and return  
it to the FAB for issuance of a new final decision, or to the  
district office for such further development as may be necessary,  
to be followed by a new recommended decision. The Director may  
also vacate any other type of decision issued by the FAB. 20 C.F.R.  
§ 320(a).

1 Accordingly, Defendant's alternative request to stay Plaintiff's claim  
2 is GRANTED.

3 **B. Motion to Strike and Motion for Summary Judgment**

4 Defendant asserts the Court should strike Plaintiff's Motion for  
5 Summary Judgment because it is premature and violates the Local Rules.  
6 (Ct. Rec. 17 at 2.) Plaintiff responds that his technical failure to  
7 cite the record is because there is no record in the Court file. (Ct.  
8 Rec. 19 at 6.)

9 Local Rule 56.1(a) states:

10 Any party filing a motion for summary judgment shall set  
11 forth separately from the memorandum of law, and in full,  
12 the specific facts relied upon in support of the motion.  
13 The specific facts shall be set forth in a serial fashion  
14 and not in narrative form. As to each fact, the statement  
shall refer to the specific portion of the record where  
the fact is found (i.e., affidavit, deposition, etc.).  
The specific portions of the record relied upon shall be  
attached to the statement of material facts.

15 LR. 56.1(a). Here, Plaintiff's motion for summary judgment is included  
16 in his response to Defendant's motion to dismiss. This is improper. The  
17 Local Rules require a separate memorandum detailing the facts supporting  
18 the motion, including appropriate references to the record. Accordingly,  
19 Defendant's motion to strike is GRANTED and Plaintiff's motion for  
20 summary judgment is stricken.

21 **C. Request for Attorney's Fees**

22 Plaintiff seeks attorney's fees on two grounds: (1) Defendant's  
23 motion to dismiss "was without any reasonable basis and grounded upon  
24 misrepresentation"; and (2) "the Solicitor's inexcusable dereliction in  
25 failing to address the issues for over four years. . . ." (Ct. Rec. 6  
26



1 at 8.) Defendant responds that Plaintiff's arguments are grounded  
2 neither in fact nor in law. (Ct. Rec. 15 at 7.)

3 Under the Equal Access to Justice Act ("EAJA"), the Court may award  
4 plaintiff attorney's fees and costs if (1) the plaintiff is the  
5 prevailing party, (2) the Government has not met its burden to show that  
6 its positions during the case were substantially justified or that  
7 special circumstances make an award unjust, and (3) the requested  
8 attorney's fees and costs are reasonable. 28 U.S.C. § 2412(d)(1)(A);  
9 *Perez-Arellano v. Smith*, 279 F.3d 791, 793 (9th Cir. 2002). A  
10 "prevailing party" is one who has been awarded some relief by the court  
11 on the merits of at least some of his claims. *Hanrahan v. Hampton*, 446  
12 U.S. 754, 758 (1980). When a case is remanded to an agency for further  
13 administrative proceedings, "the claimant will not normally attain  
14 'prevailing party' status within the meaning of § 2412(d)(1)(A) until  
15 after the result of the administrative proceedings is known." *Sullivan*  
16 *v. Hudson*, 490 U.S. 877, 886 (1989).

17 Here, it is premature to award attorney's fees until the DOL issues  
18 a final agency decision either granting or denying Plaintiff's EEOICPA  
19 claims. Accordingly, Plaintiff's request for attorney's fees is DENIED.

20 **D. Motion for Leave to File Amended Complaint**

21 Plaintiff seeks to amend his original Complaint by adding exhibits  
22 to support the original Complaint's allegations. (Ct. Rec. 22 at 2.)  
23 Defendant opposes the additional exhibits because a district court's  
24 review is limited to the administrative record. (Ct. Rec. 25 at 2.)

25 It is unnecessary to decide Plaintiff's Motion for Leave to File  
26 Amended Complaint until the DOL issues a final agency decision.

1 Accordingly, Plaintiff's motion is DENIED with leave to renew as soon as  
2 either the stay is lifted or the Department of Labor issues its decision.

3 **III. Conclusion**

4 **ACCORDINGLY, IT IS HEREBY ORDERED:**

5 1. Defendant's Motion to Dismiss (**Ct. Rec. 3**) is **GRANTED IN PART AND**  
6 **DENIED IN PART.** Plaintiff's claim is **STAYED** for 90 days. The parties  
7 are instructed to notify the Court about Plaintiff's claim status in 90  
8 days.

9 2. Defendant's Motion to Strike Plaintiff's Motion for Summary  
10 Judgment (**Ct. Rec. 16**) is **GRANTED.**

11 3. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 6**) is **STRICKEN.**

12 4. Plaintiff's Request for Attorney's Fees (**Ct. Rec. 6**) is **DENIED.**

13 5. Plaintiff's Motion for Leave to File Amended Complaint (**Ct. Rec.**  
14 **22**) is **DENIED** with leave to renew as soon as either the stay is lifted  
15 or the Department of Labor issues its decision.

16 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
17 this order and to provide copies to counsel.

18  
19 **DATED** this 17<sup>th</sup> day of September 2007.

20  
21 S/ Edward F. Shea  
22 EDWARD F. SHEA  
United States District Judge

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